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Supreme Court, U.S.
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In the
# Supreme Court of the United States
October Term, 1991

PETER R. PIEKARSKI,

*Petitioner,*

vs.

HOME OWNERS SAVING BANK, F.S.B., and M. GENE DONLEY,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether the Resolution Trust Corporation, under the removal provisions of FIRREA,[1] has an absolute right to remove a state court action a second time, independent of the common law and statutory limitations imposed on other litigants.

II. Whether the exercise of federal court jurisdiction under FIRREA, as applied to Piekarski's solely state law claims, violates principles of federalism and due process, when the case is removed to Minnesota federal district court after

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[1]The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L.No. 101-73, 103 Stat. 183 et. seq.

liability has been determined by the state trial court, is remanded to the state court, is removed again to the District Court for the District of Columbia on grounds existing at the time of the first removal, and is finally transferred back to the Minnesota federal district court (a court which had declined to transfer the case to the transferor court in the first instance, a court where the action could not "have been brought" originally, and a court that subsequently dismissed the distant parent company under federal receivership).

III. Whether collateral papers filed at the same time as an actual

notice of appeal may serve as the functional equivalent of the notice of appeal.

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**IN THE SUPREME COURT OF THE UNITED STATES**
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Peter R. Piekarski,

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vs.

Home Owners Savings Bank, F.S.B. and M. Gene Donley,

Respondents.

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES**

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Peter R. Piekarski, the petitioner herein, prays that the writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Eighth Circuit, and/or the judgment of the United States District Court for the District of Columbia.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 956 F.2d 1484 (8th Cir. 1992) and is printed in Appendix A hereto, infra, page A-1. The judgments of the United States District Court for the District of Minnesota are reported at 759 F.Supp 542 (D.Minn. 1991), 755 F.Supp 859 (D.Minn. 1991), and 752 F.Supp. 1451 (D.Minn 1990) and are printed in Appendix A hereto, infra, pages A-72, A-105 and A-146 respectively. The judgment of the United States District

Court for the District of Columbia is reported at 743 F. Supp. 38 (D.D.C. 1990) and is printed in Appendix A hereto, infra, page A-262.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 28, 1992. A timely petition for rehearing was denied on April 8, 1992. (Appendix A, infra, page A-315). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1). In addition, this Court has jurisdiction to determine whether federal jurisdiction has been improvidently exercised below.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Petitioner states that 28 U.S.C. §2403(a) may be applicable.

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case involves the Tenth Amendment to the Constitution of the United States, which provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This case involves 12 U.S.C. §1441a(l), which provides as follows:

> (l) Power to remove; jurisdiction
>
> (1) In general
>
> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

(2) Corporation as party

The Corporation shall be substituted as a party in any civil action, suit, or proceeding to which its predecessor in interest was a party with respect to institutions which are subject to the management agreement dated February 7, 1989, among the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board and the Federal Deposit Insurance Corporation.

(3) Removal and remand

The Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit, or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located. The removal of any action, suit, or proceeding shall be instituted --

(A) not later than 90 days after the date the Corporation is substituted as a party, or

(B) not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after August 9, 1989.

The Corporation may appeal any order of remand entered by a United States district court.

## STATEMENT OF THE CASE

### The Procedural Facts

This case was commenced in Hennepin County District Court, State of Minnesota. The defendants then transferred the case to Otter Tail County District Court, State of Minnesota. The state trial judge found liability on four separate grounds following a unanimous verdict from an advisory jury. The jury found all sixteen issues in favor of Piekarski including two grounds for punitive damages against individual defendant Donley. See State Trial Findings, reprinted in Appendix A, 752 F.Supp. 1451, 1458-70 (D.Minn. 1990).

After the liability determination, but before the damages portion of the

bifurcated trial, the defendants removed the action to the United States District Court for the District of Minnesota based on the federal receivership of a distant parent company, Home Owners of Boston.[2] That court, J. Devitt, remanded the case back to the state court, on plaintiff's motion, interpreting 12 U.S.C. §1441a(l) as requiring removal exclusively to the United States District Court for the District of Columbia. See Memorandum and Order, 6/12/90, pp. 2-5, reprinted in Appendix A, infra p. A-330. Judge

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[2] Home Owners-Boston is the parent company of Knutson Mortgage Company (headquartered in Minneapolis), and Knutson Mortgage Company is in turn the parent company for Home Owners-Fergus Falls.

Devitt also denied defendants' motion to transfer venue to the United States District Court for the District of Columbia because, despite the fact that the "court [had] the power to transfer under the act",[3] "[c]onsiderations of equity and judicial economy weigh[ed] against transfer." Id. at 5.

Defendants next removed the case to the United States District Court for the District of Columbia. Piekarski moved for remand, and the defendants filed a motion to transfer the case back to the United States District Court for the District of Minnesota. That court, J. Hogan, could "see no

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[3] Pursuant to either 28 U.S.C. §1631 or 28 U.S.C. §1406(a).

reason to interrupt [the] on-going state proceeding to grant the RTC the 'benefit' of a federal forum;" nor could it see any "potential for abuse by allowing the RTC to defend such an action in state court." 743 F.Supp. 38, 43, n.6 (D.D.C. (1990)). However, it denied Piekarski's motion to remand, holding that FIRREA afforded the "RTC the absolute right, to remove to federal court, subject to the time limitations imposed in the statute." Id. at 42. Judge Hogan concluded that "Congress would be wise to revisit the FIRREA removal provisions to consider whether a federal forum is necessary in every case involving the RTC (particularly those involving only issues of state law)." Id. at 44.

The court then transferred the case to the United States District Court for the District of Minnesota, in an acknowledged "exercise in legal gymnastics," pursuant to 28 U.S.C. §1404(a). Id. Fearing that an improvidently exercised transfer would, in combination with the arguments against the propriety of the second removal, deny the transferee court jurisdiction to render a judgement in his favor, Piekarski "oppos[ed] the transfer." Id. at 42. Judge Hogan phrased the "crucial question [as] whether or not the federal court in Minnesota [was] a district where this action "might have been brought." Id. He observed that "[h]ad the RTC been named as a

defendant at the commencement of the suit, the suit 'might have been brought' in Minnesota." Id. at 43. The RTC could not have been named at the commencement of the suit, however, since the parent company in Boston was not under federal receivership until well after the trial had begun. Nonetheless, Judge Hogan held that the dictates of Hoffman v. Blaski, 363 U.S. 335 (1960),[4] are limited to its particular facts and that a

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[4] In Hoffman, this Court held that the phrase "where it might have been brought" cannot be interpreted to mean "where it may now be rebrought, with defendants' consent." 363 U.S. at 342, 343. Judge Hogan held that Hoffman is properly limited by the phrase "with defendants' consent" because clearly he interpreted the phrase to include where it may now be rebrought.

retrospective impossibility satisfied the meaning of 28 U.S.C. §1404(a). Id. at 42-43.

Piekarski again contested the second removal, transfer, and exercise of jurisdiction over his purely state law claims in another motion to remand when the case was returned to the United States District Court for the District of Minnesota. That motion was denied, without a published opinion, but Piekarski prevailed in the damages portion of the trial. See 752 F.Supp. 1451 (D.Minn. 1990). Piekarski also prevailed in post-trial motions to have the state court liability determinations overturned. See 759 F.Supp. 542 (D.Minn. 1991). The court did however amend the judgment to

dismiss the only defendant under federal receivership, Home Owners-Boston. Id. at 546. At every opportunity prior to that judgment Piekarski contested the federal jurisdiction over his claims. As FIRREA only grants the RTC appellate review of motions to remand that are granted, this is Piekarski's first opportunity to appeal the exercise of jurisdiction over his claims. See 12 U.S.C. §1441(l)(3).

Home Owners-Fergus Falls appealed the district court decision by filing a Notice of Appeal on April 5, 1991. The Notice of Appeal did not name individual defendant Donley as an appellant. Although the Eighth Circuit Court of Appeals contacted

Donley's counsel well within the 30-day appeal period, and advised him of the possible insufficiency of the "et. al" designation on the Notice of Appeal, Donley nevertheless failed to appeal within that period.

Thereafter, Donley filed an Amended Notice of Appeal on May 2, 1991 and requested Judge Devitt to accept the appeal claiming excusable neglect on the part of his counsel. Judge Devitt, finding no basis for the request, denied it. See Order, 4-90-661, pp. 3-5, Appendix A, infra page A-368. However, upon entertaining the issue on the merits, the Eighth Circuit Court of Appeals held that Appellant's Information Form A, an accompanying paper which listed Donley

as a party appealing the judgment, satisfied a "functional equivalent" exception to the particularity requirement of Federal Rule of Appellate Procedure 3(c). See 956 F.2d 1484, 1486, n. 1 (8th Cir. 1992). The Court went on to reverse all findings of liability against the defendants.

## REASONS FOR GRANTING THE WRIT

### I.

### Certiorari Should Be Granted to Remedy an Improvident Exercise of Federal Court Jurisdiction.

This case, based exclusively on state law claims, was commenced on November 18, 1988. The trial was bifurcated between liability and damages with an advisory jury sitting

during the liability phase. On February 20, 1990, the state trial court issued its findings of fact, conclusions of law and order for judgment against the defendants. Reprinted in Appendix A, p.___, 752 F.Supp. 1451, 1458-70 (D.Minn 1990). On April 27, 1990, the Office of Thrift Supervision was appointed conservator for Home Owners-Boston, the parent company of Home Owners-Fergus Falls' parent company Knutson Mortgage Company.

The action was originally removed to the United States District Court for the District of Minnesota by notice of removal on May 7, 1990. Judge Devitt remanded the case to state court on June 12, 1990, because

the "defendants could only have removed to the United States District Court for the District of Columbia", and he refused to transfer it there because "equity and judicial economy weighed against transfer." Memorandum and Order, Civ. 3-90-248, Reprinted in Appendix A, p. A-330, pp. 4-5. However, on June 15, 1990, the defendants removed the action a second time to the United States District Court for the District of Columbia.

Traditionally, courts have prohibited second removals that are based either on the same grounds rejected previously, St. Paul and Chicago R. Co. v. Mclean, 108 U.S. 212, 217 (1883), or based on grounds that existed at the time of the first

removal. Pope v. Cheney, 22 F. 177, 178-179 (S.D. Iowa 1884). Implicit in those prohibitions are the strict conditions under which a defendant may seek a second removal under 28 U.S.C. §1446(b) and the common law doctrine codified therein. See Fritzlen v. Boatsmen's Bank, 212 U.S. 364, 372 (1909); Powers v. Chesapeake & Ohio Ry., 169 U.S. 92 (1898). "These cases [and Section 1446(b)] stand for the proposition that a defendant who fails in an attempt to remove on the initial pleadings can file a removal petition when subsequent pleadings or events reveal a new and different ground for removal." Federal Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979) (emphasis in original)

Case law uniformly holds that where the grounds relied upon for a second removal existed at the time of the first removal, the defendants are foreclosed from asserting such a basis for removal. See The Texas Plumbing Company v. Zurn Industries, Inc., 168 F.Supp. 144, 145 (N.D.Tex. 1958); see also Kulbeth v. Woolnought, 324 F.Supp. 908, 911 (S.D.Tex. 1971). Prior to FIRREA, courts also gave effect to those requirements when interpreting removals by federal banking agencies. See Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979). The only circuit court to discuss the issue after the passage of FIRREA was cautious of the prohibitions against second removals. Kirkbride v.

Continental Cas. Co., 933 F.2d 729, 732 (9th Cir. 1991) (Santiago satisfied because "subsequent pleadings or events revealed a new and different ground for removal.").

In the present case, the United States District Court for the District of Columbia erroneously rejected the second removal limitation. It noted that "FIRREA does not prohibit a party from correcting the defective removal attempted to a court," and thereby reasoned that it affords the "RTC the absolute right to remove to federal court, subject to the time limitations imposed in the statute." 743 F.Supp. 38, 41-42 (D.D.C. 1990). By allowing the second removal of this action under the "absolute right" rationale,

the court (1) ignored the common law prohibition against second removals; (2) abrogated the purpose of the time period allowed for removal; and (3) failed to recognize that the general statutory procedure provisions supplement FIRREA, especially on issues where FIRREA is silent.

Although FIRREA does not prohibit second removals, the common law prohibits a second attempt at removal that is not "new and different." See Santiago, 598 F.2d 634, 636 (1st Cir. 1979) (citing the common law origins); see also Kirkbride, 933 F.2d at 732 (9th Cir. 1991) (FDIC petition did not violate any common law prohibition against successive removals). A procedural avenue to another federal

district court can only be "new" if it didn't exist at the time of the first removal. Thus, since all statutory bases for removal existed from the outset of the RTC's appointment as receiver for Home Owners-Boston, a second attempt at removal is prohibited. The rule properly places the risks and uncertainties surrounding the interpretation of the provisions on the party choosing to invoke its protections-the RTC. In addition, litigants lacking the federally funded muscle of the RTC may, in good faith, challenge a removal without the chilling possibility of a second attempt, and perhaps a return to the same

venue.[5]

Allowing the RTC to remove this action a second time resulted in an abrogation of the purpose of the FIRREA time provision. Using the 90 day time limit[6] to facilitate second

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[5] See Bank/Thrift Litigation and Enforcement News, RTC Solves Its Removal Problem -- Maybe & Sort Of, Vol. 2, No. 22, p. 1, 4 (discussing this case and concluding that "counsel thinking of opposing the government's removal motions" will be forced to consider that "their cases will end up in federal court anyway, in their local district or even in Washington.").

[6] 12 U.S.C. §1441a(l)(3) provides in relevant part:

The removal of any action, suit, or proceeding shall be instituted -- (a) Not later than 90 days after the date the Corporation is substituted as a party, or (b) Not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after August 9, 1989.

removals runs counter to the purpose of that provision. The extended removal period is meant to allow the RTC to familiarize itself with the litigation prior to removal, not to test the removal waters. The legislative history reflects that the ability of the FDIC to stay proceedings for 45 days upon its appointment as conservator or receiver for the failed institution provides the same rationale as the extension of the RTC removal time. "The appointment of a conservator or receiver can often change the character of the litigation; the stay gives the FDIC a chance to analyze pending matters and decide how best to

proceed."[7] Plainly, the purpose of the extra period is to allow the RTC time to determine "how best to proceed".

When the RTC first exercises the right of removal that purpose is fully satisfied. A second removal outside of the 30 days normally allowed[8] simply facilitates the abuse of the provision. The law against second removals is designed to curb such abuse. Ignoring such considerations enables parties to use removal "as a means of delay and protracting litigation to the manifest injury of

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[7] H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 331 (1989), reprinted in 1989 U.S. Code Cong. and Admin. News (103 Stat. 86, 127).

[8] 12 U.S.C. §1441a(l)(3)(b).

the other parties in interest." Pope v. Cheney, 22 F. 177, (S.D. Iowa. 1884).

Most importantly, the United States District Court for the District of Columbia's refusal to apply the prohibitions against second removals to FIRREA, absent such a directive in FIRREA itself, ignores what other courts have nearly universally accepted -- that general federal statutory procedure provisions must supplement FIRREA, especially and necessarily where that statute is silent. The RTC removal provisions cannot be wholly independent from the general provisions because it is impractical to expect every statute that changes some removal provisions

to address all of the exhaustive considerations.

Courts have concluded that there would be no reason to enumerate the specific changes if Congress meant for FIRREA to be completely independent of the general removal provisions. See Resolution Trust Corporation v. Lightfoot, 938 F.2d 65, 68 (7th Cir. 1991); see also Woburn Five Cents Sav. Bank v. Robert M. Hicks, Inc., 930 F.2d 965, 968 (1st Cir. 1991) (applying the same reasoning to interpret the FDIC removal procedures with guidance from the general removal statute). Lightfoot represents the prevailing view that the FIRREA provisions supplement the general statutory procedural provisions, not

supplant them. 938 F.2d 65, 68 (7th Cir. 1991).[9] Even a court that prescribed to Judge Hogan's "absolute

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[9] Note that under Lightfoot the defendants would have been successful in their first effort to remove this case to the United States District Court for the District of Minnesota pursuant to 28 U.S.C. §1441(a). However, that does not vitiate the fact that the second removal was improper.

Moreover, at the time of the first removal the district courts were denying the RTC use of 28 U.S.C. §1441(a). See Federal Sav. and Loan Ins. v. Westgate Partners, 726 F.Supp. 807, 809 (D.Colo. 1989). Since this was the first case in which the RTC attempted a second removal to the District Court for the District of Columbia, Piekarski could not have anticipated the procedural nightmare to follow. See Bank/Thrift Litigation and Enforcement News, RTC Solves Its Removal Problem -- Maybe & Sort Of, Vol. 2, No. 22, p. 1,4 (not until after this case would "counsel thinking of opposing the government's removal motions" . . . consider that "their cases will end up in federal court anyway, in their local district or even in Washington".).

right to remove" recognized that the general procedural provisions supplement FIRREA and implicitly acknowledged that a second removal to the District Court for the District of Columbia would be an improvident exercise of jurisdiction under 28 U.S.C. §1446. See Sweeney v. Resolution Trust Corp., 765 F.Supp. 33, 35 (D.Mass. 1991).[10]

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[10] In Sweeney, the court dismissed plaintiff's motion to remand as untimely under 28 U.S.C. §1447(c). Moreover, the court implicitly recognized that a subsequent removal to the District Court for the District of Columbia, if remand were granted, should be unsuccessful. Id. If not, the plaintiff could simply anticipate being cast out to the District of Columbia, only to be reeled in under 28 U.S.C. §1404(a). If the Sweeney court thought that that was a likely scenario then plaintiffs' untimely motion to remand should have been characterized as wise rather than untimely.

Where a second removal fails to present new and different grounds as required by 28 U.S.C. §1446(b), Congress has directed that such actions be remanded to the state courts. See O'Bryan v. Chandler, 496 F.2d 403, 409 (10th Cir. 1974)("there must be both an amended pleading or paper and a ground for asserting removability that exists for the first time.") As such, Congress has effectively declined jurisdiction to the federal courts where defendants fail to satisfy that mandate.

This case has cast the FIRREA removal issue into waters that have

spawned absurd consequences.[11] In order to mitigate the absurd outcomes, the United States District Court for the District of Columbia developed a transfer remedy. Under the general transfer provision, courts may transfer cases to "any other district or division where it might have been brought" for the convenience of the parties. 28 U.S.C. §1404(a). The District Court for the District of Columbia broadly construed that provision, allowing transfer of this case back to the District Court for

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[11] See Josel, The Resolution Trust Corporation: Waste Management and the S & L Crisis, 59 Fordham L. Rev. S339, n. 179 (1991)(summarizing other cases of purely state law origins that have matriculated through the United States District Court for the District of Columbia).

the District of Minnesota which (as interpreted) was instructed to decline jurisdiction in the first instance. While remedying the immediate inconvenience, the transfer created an anomalistic result which admittingly was "an exercise in legal gymnastics." 743 F.Supp. 38, 44 (D.D.C. 1990).

Moreover, that result will likely discourage litigants from contesting an RTC removal to a federal court in the state where the action was pending. See Bank/Thrift Litigation and Enforcement News, RTC Solves Its Removal Problem-- Maybe & Sort Of, Vol. 2, No. 22, p. 1, 4. Contesting the removal allows the RTC to flex its federally-funded muscles, often at the expense of other litigants. This

Court has noted that such a "vicious circle of litigation" is disfavored. Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 816 (1988).

That vicious circle of litigation is broken if the abuses regarding second removals are curbed. The common law and statutory doctrines restricting second removals prohibit the accommodation made to the defendants, allowing them to remove this action a second time. Permitting second removals promises to give the RTC carte blanche to abuse the removal process to the prejudice of other litigants. This Court should grant Certiorari to determine whether the second removal and transfer of

this action was improvidently taken so as to deny the federal courts jurisdiction to render judgment in this case, or whether the RTC has in fact an "absolute right to remove," immune from the statutory and common law limitations imposed on other litigants.

II.

**Certiorari Should Be Granted to Remedy an Unconstitutional Exercise of Federal Court Jurisdiction.**

Commentators have already speculated that the procedural history of this case raises due process concerns.[12] Moreover, other courts have stated

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[12] See Josel, The Resolution Trust Corporation: Waste Management and the S & L Crisis, 59 Fordham L. Rev. S339 (1991); see also Grafman, A New S & L Venue Game, Nat'l L.J., Jan. 14, 1991, at 13, 14.

"reservations about remanding a matter involving only state law issues that will probably be removed to the District of Columbia, only to be transferred back to this Court after one of the parties files a motion to transfer," but "[s]till, the Court sees no other way to interpret Congressional intent with regard to FIRREA's removal provision." Hellon & Assocs. Inc v. Phoenix Resort Corp., 755 F.Supp. 280, 284 (D.Ariz. 1990). The issue is now ripe for a determination of whether that "Congressional intent", if any, can be applied to the facts and circumstances of this case and still pass constitutional muster.

At first blush, this case appears best pigeonholed in notions of comity and federalism through application of the abstention doctrine which has grown up around those interests. See Younger v. Harris, 401 U.S. 37, 44-45 (1971). Clearly such a discretion would have been exercised in this case because Judge Hogan stated that he could "see no reason to interrupt an on-going state proceeding," . . . nor "potential for abuse by allowing the RTC to defend such an action in state court." 743 F.Supp. 38, 43, n.6 (D.D.C. 1990). However, since this Court's decision in Thermtron Products v. Hermansdorfer, courts have been prohibited from remanding cases properly removed for discretionary

reasons not authorized by the controlling statute. 423 U.S. 336, 345, n.9. (1976). Thermtron was not an extraordinary result on its facts,[13] but nonetheless, the District Court for the District of Columbia used that rule to foreclose any equitable considerations in the remand decision. 743 F.Supp. 38, 42 (D.D.C. 1990).

This Court has noted that a change in forum is a procedural consideration. Hallowell v. Commons, 239 U.S. 506 (1916); see also Griffon v. United States Dept. of Health and Human Services, 802 F.2d 146, 152 (5th

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[13] In Thermtron, the district court remanded the case solely because the judge faced an over-crowded docket. 423 U.S. 336, 339 (1976).

Cir. 1986). However, in order to withstand scrutiny under the Fifth Amendment's due process clause a statute must have a legislative purpose, applied in a manner that is neither harsh nor oppressive. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984). The removal provisions in FIRREA did not simply work a change in forum in this case, but rather snatched Piekarski's state court liability victory out of the state courts into such a federal procedural quagmire that due process mandates that a discernable purpose justify that result. Courts have struggled to discern the possible congressional intent behind the FIRREA removal

provisions, or at least have sought a common sense harmony between FIRREA and removal actions generally. See Resolution Trust Corporation v. Westgate Partners, Ltd., 937 F.2d 526, 531 (10th Cir. 1991). However, in this case there is simply no rational basis for applying the FIRREA removal provisions. The fact that some courts have sought to solve the problem by extending the general removal provision to the RTC does not vitiate the unconstitutional application of the FIRREA provision to this case.[14]

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[14] The Seventh Circuit has held that 28 U.S.C. §1441(a) is available to the RTC absent explicit language to the contrary. See Resolution Trust Corporation v. Lightfoot, 938 F.2d 65, 67, 68 (7th Cir. 1991).

Although some areas of FIRREA are characterized by "voluminous"[15] legislative history, the FIRREA removal provisions are afforded only a repetition of the language itself.[16] That lack of apparent thought is consistent with what a commentator has dubbed as the "S & L hopscotch" and concluded that "[i]ntentionally or not, FIRREA legislation can create a highly eccentric Rube Goldberg cartoon version of due process." Grafman, A New S&L Venue Game, Nat'l L.J., Jan. 14, 1991, at 13, 14. In fact, a

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[15] See Mountain Ridge State Bank v. Investor Funding, 763 F.Supp. 1282, 1289 (D.N.J. 1991).

[16] See H.Rep.No. 54(I), 101st Cong., 1st Sess. 362 (1989), U.S. Code Cong. & Admin.News 1989, pp. 86, 158.

Congressional intent or purpose, even if possible to discern, has been virtually abandoned in the judicial construction of the provision.[17] "One thing, though, is crystal clear. This newly evolving game of legal hopscotch makes no sense." Id.

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[17] For example, in Westgate, the RTC had removed the action to its institution's principle place of business and argued that it could do so under the provisions of FIRREA. 937 F.2d 526 (10th Cir. 1991). The Court rejected that argument under the statute's plain meaning. Id. at 529. More importantly for present purposes, the court commented that it is unnecessary to discern a logical congressional intent from the FIRREA removal provision, concluding that "so long as Congress remains faithful to the Constitution, it is free to enact any number of foolish statutes." Id.

While statutory construction may not mandate a discernable purpose, due process does.

A statute will withstand scrutiny under the due process clause of the Fifth Amendment if Congress enacts it pursuant to a rational legislative purpose, in a manner that is neither harsh nor oppressive. Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 733 (1984). Assuming the FIRREA removal provisions have a discernible purpose, the application of those provisions to the present case was sufficiently offensive to raise due process concerns. In this case, the removal of solely state law claims after a state court determination of liability, followed by another removal after the first attempt failed, was based solely on the federal receivership of a distant

parent company that was never involved substantively in the case.

In addition to requiring a legitimate purpose and rational application of the FIRREA removal provisions to the present action, due process dictates that retroactive application of new procedural provisions must afford the burdened party a "substantial and efficient remedy." Crane v. Hahlo, 258 U.S. 142, 147 (1922). This constitutional protection is appropriate to the facts of this case because much of the inefficiency is a product of the retroactive application of FIRREA. Courts have held that the jurisdictional provisions of FIRREA must be applied retroactively, as in

the present case, to cases filed before the passage of FIRREA. See Triland Holdings & Co. v. Sunbelt Service. Corp., 884 F.2d 205, 206-07 (5th Cir. 1989). However, that fact does not absolve the constitutional limitations imposed by due process, but rather should heighten the inquiry.

The only case to address the issue has rejected the due process challenge based on a lack of compelling procedural hardship. See Sunbelt Savings v. Bent Trail Phase IV Joint Venture, 907 F.2d 1569, 1571 (5th Cir. 1990) (substantial and efficient remedy provided by FIRREA). By contrast, this case has been the ultimate RTC "guinea pig", see supra

note 9 and accompanying text, and its procedural history has left an actual "bent trail" from the state trial court to the federal district court in Minnesota, back to the state trial court, across the country to the federal district court in Washington, D.C., and then back again to the federal district court in Minnesota. Moreover, the damages portion of the trial required the repetition of a substantial amount of evidence, 759 F.Supp. 542, 545 (D.Minn. 1991) (damages portion of trial requiring Judge Devitt to become "relatively familiar with that portion of the liability record pertaining to plaintiff's retaliatory discharge claim"), and defendants post-trial

motions effectively forced the plaintiff to fund a response to an attempted "microscopic reexamination of the entire liability record." Id. As such, the retroactive application of the FIRREA removal powers to this case offends the "efficiency" guarantee embodied in due process. See Crane v. Hahlo, 258 U.S. 142, 147 (1922).

The next constitutional hurdle that the FIRREA removal provisions must clear is the limitation embodied in federalism. One federal district court has suggested that removal of a state court decision to a federal district court runs contrary to the nature of our federalist system. Federal Deposit Ins. Corp. v.

Sellards, 731 F.Supp. 1300, 1301-04 (N.D.Tex. 1990).[18] Another federal district court has granted a motion to remand based on "consideration to the values of federalism and comity, as embodied in the Full Faith and Credit Act, 28 U.S.C. §1738." Federal Sav. & Loan Ins. Corp. v. Templeton, 700 F.Supp. 456, 457-58 (S.D.Ind. 1988). In this case the only federal interest was a receivership interest over a distant parent company that was ultimately dismissed from the

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[18] The court had another means of disposing of the removal issue and thus avoided the constitutional issue. Id. at 1304.

lawsuit.[19]

The federalism concern in this context arises in part from the fact that lower federal courts possess no power to sit in direct review of state court decisions. See Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296 (1970). In fact, Judge Devitt was concerned that his review of the state court liability determinations in this

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[19] The power to remove is evaluated at the time of removal, and the dismissal of one of the parties by the time of appeal does not normally affect the propriety of removal. See Federal Sav. & Loan Ins. Corp. v. Griffin, 935 F.2d 691, 695 (5th Cir. 1991). However, in this case it wasn't the dismissal of the federal interest in the case, but rather its remoteness that heightens the federalism concerns.

case raised such an issue. 759 F.Supp 542, 545 (D.Minn. 1991) ("this court does not occupy an appellate rank vis-a-vis the state district court"). Under the reasoning of this Court in Atlantic Coast Line, if a federal interest is sufficiently affected by a state trial court liability determination it may seek vindication of that right in the state "appellate courts and ultimately, if necessary, in this Court." 398 U.S. at 296.

Judge Devitt entertained defendants post-trial motions pursuant to Federal Rule of Civil Procedure 60(b). 759 F.Supp. 542, 543 (D.Minn. 1991). The Fifth Circuit has said that "a state court judgment in a case properly removed can be vacated under Rule

60(b)." Northshore Development, Inc. v. Lee, 835 F.2d 580, 583 (5th Cir. 1988). The Sellards court criticized that blanket statement because the authority for making it was based on cases seeking relief from default judgments. 731 F.Supp. at 1303-04, n.9.[20] Since Piekarski prevailed on those post-trial motions the federalism interest appears less offended. However, even if such an after the fact analysis were proper, the limitations embodied in Atlantic Coast Line extend beyond the initial

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[20] The court reasoned that a "default judgment is a far cry, however, from a state court judgment reached by the state judge after consideration by that judge of the parties' appearances, pleadings, motions and oral argument." Id.



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offensive act to appellate review. 398 U.S. at 296.

In sum, this Court should grant Certiorari to determine whether the retroactive application of the FIRREA removal provisions to this action (1) was pursuant to a rational Congressional purpose and applied in an inoffensive manner as required by due process; and/or (2) provided a substantial and efficient remedy as required by due process; and/or (3) can be reconciled with concerns of federalism.

III.

**Certiorari Should Be Granted to Resolve a Conflict Between Circuit Courts.**

Federal Rule of Appellate Procedure 3(c) requires that a notice of appeal "shall specify the party or parties



NOTE:

INATION IS NOT CONTINUOUS.

taking the appeal." A notice of appeal which designates a party by only "et al." is defective as to that party. Torres v. Oakland Scavenger Co., 487 U.S. 312, 317-18 (1988). However, the circuit courts disagree as to whether a collateral paper cures a defective notice.

The dispute is sparked by language in Torres which has given rise to a "functional equivalency" exception. This Court stated that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires."

Id. at 316-17. The Eighth Circuit, both in the present case and in another, has extended this exception to the circumstance where the collateral paper is filed at the same time as the notice of appeal. 956 F.2d 1484, 1486 (8th Cir. 1992) (citing Good Samaritan Hosp. v. Sullivan, 952 F.2d 1017, 1021-23 (8th Cir. 1991)).

In contrast, the Seventh Circuit has stated that the above cited language in Torres "insofar as it pertains to Rule 3(c), is designed for the case where the litigant fails to file a notice of appeal, but files another paper that is its functional equivalent. It is not designed for the case--this case and Torres--where the litigant has filed a notice of

appeal and failed to name all the appellants." Allen Archery, Inc. v. Precision Shooting Equip., 857 F.2d 1176, 1177 (7th Cir. 1988). Thus, the Seventh Circuit holds that the "appellant must be named in the notice of appeal; naming him in the caption, or in collateral documents . . . will not do." Id.[21]

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[21] It is with this blanket prohibition with which other circuit courts have disagreed with the Seventh Circuit. However, the disagreement has primarily focused on whether listing a party in the caption of the notice itself is sufficient, not whether collateral documents are sufficient when an actual notice of appeal is present. See Minority Employees v. Tenn. Dept. of Emp. Sec., 901 F.2d 1327, 1335 (6th Cir. 1990) (corporate plaintiff stated in the caption of the notice is properly before the court); see also Mariani-Giron v. Acevedo Ruiz, 877 F.2d 1114, 1116 (1st Cir. 1989)(caption should be viewed as part

The Eighth Circuit in Good Samaritan explicitly rejected the approach in Allen Archery. Good Samaritan, 952 F.2d at 1022, n. 5.[22] The primary authority cited for the Eighth Circuit approach is Dura Systems, Inc. v. Rothbury Inv., Ltd., 886 F.2d 551, 555 (3d. Cir. 1989),

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of the entire notice). In fact, the Seventh Circuit has retracted its position with regard to the caption. See Hartford Casualty Ins. Co. v. Borg-Wasner Corp., 913 F.2d 419, 423 (7th Cir. 1990).

[22] The circuit court below simply adopted the holding in Good Samaritan as its own, 956 F.2d 1484, 1486, n.1 (8th Cir. 1992), and therefore it is the analysis supporting that decision that is at issue in this case. Moreover, it was a decision that was filed after oral arguments were heard in the present case, and therefore its applicability and reasoning was never briefed by the parties.

cert. denied, 493 U.S. 1046 (1990), which held that a consent order could serve as the functional equivalent of a notice when filed within the time for appeal. The court in Good Samaritan stated that "[w]hile this is a case of first impression in this circuit, we agree with other circuits which have held that additional documents filed within the statutory period for notices of appeal are the functional equivalent of a notice of appeal and, therefore, serve as a notice of appeal." 952 F.2d at 1022. The Eighth Circuit has held in this case and Good Samaritan that collateral papers filed at the same time as an actual notice of

appeal can serve as the functional equivalent of the notice.

Therefore, this case heightens the concern expressed in Allen Archery that the functional equivalency language in Torres is "designed for the case where the litigant fails to file a notice of appeal, but files another paper that is its functional equivalent." 857 F.2d at 1177; see also Pride v. Venango River Corp., 916 F.2d 1250, 1251-53 (7th cir. 1990), cert. denied 111 S.Ct. 1696 (rejecting the functional equivalency exception where an actual notice of appeal is filed). While a Consent Order granted by the appellate court itself may serve as the functional equivalent of an actual notice of appeal, Dura

Systems Inc., 886 F.2d at 554-55, a collateral paper filed at the same time as an actual defective notice of appeal creates ambiguity. The Court of Appeals below stated that the collateral document "unambiguously listed Donley as a party appealing the final judgment." 956 F.2d at 1486, n.1. However, Donley's absence was just as "unambiguous" from the notice of appeal itself. Therefore, whatever application the functional equivalency exception has to later functionally equivalent papers received within the time period of appeal (which can be viewed as a separate invocation of the court's jurisdiction), it has no application in this case. See Minority Employees v. Tenn. Dept. of

Emp. Sec., 901 F.2d 1327, 1336 (6th Cir. 1990)(any ambiguity or inconsistency will defeat the functional equivalency exception).

In this case the court clerk advised the defendants of the possible deficiency well within the time for appeal. Nonetheless, individual defendant Donley failed to correct the defect within that time period. See Affidavit of Lawrence P. Schaefer (Appendix A, infra, page 295). Given the extraordinary lengths to which the defendants went in attempting to exercise federal court jurisidiction, it is most appropriate that this court "insist on punctilious, literal, and exact compliance with the requirement in Rule 3(c) that the notice of appeal

(or its functional equivalent, if but only if no notice of appeal is filed) 'shall specify the party or parties taking the appeal'." Allen Archery, 857 F.2d at 1177.

In sum, the circuit courts disagree as to whether a collateral paper can serve as the functional equivalent of a notice of appeal when an actual notice of appeal, defective as to one of the parties, is simultaneously filed. Piekarski deserves review of this issue to settle this important dispute, and to correct the erroneous exercise of jurisdiction over individual defendant Donley.

## CONCLUSION

Wherefore, petitioner respectfully

prays that a writ of certiorari be granted.

Respectfully submitted,

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